

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PABLO BERIQUETE, DIOGENES FILPO,
MARVIN HOLMES, LAWRENCE LEWIS,
LUIS TORRES, MILAN HEGGS, ALONZO
JACOBS, and DAVID RHODES,

Plaintiffs,

v.

DANIEL F. MARTUCELLO III, Acting
Commissioner, New York State
Department of Corrections and
Community Supervision, and MARK
MILLER, Superintendent, Green
Haven Correctional Facility

Defendants.

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: **ECF CASE**
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: **79-cv-5077 (LAP)**
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: **[PROPOSED] ORDER**
: **PRELIMINARILY**
: **APPROVING MODIFIED**
: **CONSENT ORDER,**
: **DIRECTING NOTICE TO**
: **CLASS AND SCHEDUING A**
: **FAIRNESS HEARING**
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WHEREAS Plaintiffs Pablo Beriquete, Diogenes Filpo, Marvin Holmes, Lawrence Lewis, Luis Torres, Milan Heggs, Alonzo Jacobs and David Rhodes (collectively "Class Representatives") and Daniel F. Marucello III, Acting Commissioner of the New York State Department of Corrections and Community Supervision and Mark Miller Superintendent of Green Haven (collectively "Defendants") have reached a proposed settlement in the form of a Modified Consent Order;

WHEREAS, on November 7, 2023 Class Counsel moved the Court to preliminarily approve the Modified Consent Order, to approve the Notice and manner of providing notice to the Class and to

schedule a Final Fairness Hearing;

WHEREAS, the Defendants did not oppose the motion, and the Court has considered all the submissions made by Class Counsel;

WHEREAS, the Court held a conference on the record on October 31, 2023 to discuss remaining issues regarding Notice and the manner of notice to the Class;

WHEREAS, the Court finds the proposed Modified Consent Order is likely to receive final approval pursuant to Federal Rule of Civil Procedure 23(e)(2), and the Class has already been certified and that notifying the Class about the terms and conditions of the Modified Consent Order and the date and time of the fairness hearing is warranted; and

WHEREAS, all terms of the Modified Consent Order remain subject to the Court's final approval;

NOW, THEREFORE, it is hereby ORDERED as follows:

1. The Court preliminarily finds that the proposed Modified Consent Order is likely to be approved pursuant to Federal Rule Civil Procedure 23(e)(2) as fair, reasonable, and adequate and warrants providing notice of the terms of the Modified Consent Order to the Class and scheduling a Fairness Hearing for final approval of the proposed Modified Consent Order. In making these findings, the Court has considered various factors including the nature of the Class's and Defendants' respective claims and defenses, the information available to the Parties, whether the

Class Representatives and Class Counsel have adequately represented the Class, whether the Modified Consent Order was negotiated at arm's length, whether the relief provided to the Class is adequate, and whether the Modified Consent Order treats the Class members equitably relative to each other. Based on these considerations, the Court preliminarily concludes that (i) the proposed Modified Consent Order is within the range of possible approval and that the Modified Consent Order resulted from serious, informed, non-collusive negotiations conducted at arm's length by the Parties and their counsel; and (ii) none of the terms and conditions of the Modified Consent Order has any obvious deficiencies or improperly grants preferential treatment to any individual Class Representative or Class Member. Accordingly, the Court preliminarily approves the Modified Consent Order.

2. Pursuant to Fed. R. Civil P. 23(e) the Court will hold a Fairness Hearing on _____, 2024 at _____ to address final approval of the Modified Consent Order before the Honorable Loretta A. Preska, District Judge for the Southern District of New York, Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, Courtroom 12A, New York, New York 10007. The Court may adjourn the Fairness Hearing and reconvene it at some other date without further notice to Class Members and may approve the Modified Consent Order, enter a final Order at or after the Fairness Hearing or any adjournment of the Fairness Hearing.

3. At the Fairness Hearing, the Court will consider, among other things:

a. Whether the Court should approve the Modified Consent Order as fair, reasonable, and adequate pursuant to Federal Rule of Civil Procedure 23(e)(2);

b. Whether the Court should find that the terms of the Modified Consent Order extend no further than necessary to correct the violations of Federal rights and whether the relief is narrowly drawn, extends no further than necessary to correct the violations of Federal rights and is the least intrusive means necessary to correct the violations;

c. Whether adequate and sufficient notice was given in accordance with this Order;

d. Whether Class Representatives and Class Counsel fairly and adequately represented the Class for purposes of entering into and implementing the Modified Consent Order;

e. Whether the Court should grant the Law Office of Amy Jane Agnew, P.C.'s application for attorney's fees and expenses, if submitted along with the request for final approval of the Modified Consent Order; and/or

f. Any other matters relating to the approval and implementation of the Modified Consent Order that the Court may deem appropriate.

4. The Court hereby approves, as to form and content, the

Notice and all of the terms, conditions, and procedures set forth in the proposed Modified Consent Order. The Court finds that the proposed Notice and notice plan will meet the requirements of due process, Fed. R. Civ. P. 23, the Rules of this Court, and any other applicable law, and constitutes appropriate notice under the circumstances and constitutes due and sufficient notice to all persons and entities entitled to such notice.

5. Class Counsel and counsel for Defendants may by written agreement make any amendments or modification to the Notice or plan for notice without notice or approval to the Court so long as such changes are not materially inconsistent with this Order and do not materially limit the rights of Class Members.

6. Together with the motion for final approval of the Modified Consent Order, Class Counsel shall file or cause to be filed with the Court a declaration from a person with knowledge confirming that notice was provided consistent with all Orders concerning notice entered by the Court.

7. The Court orders Co-Class Counsel, Law Office of Amy Jane Agnew, P.C. to pay the costs of reproducing the Notice and Modified Consent Orders, as well as ample number of translations subject to any reasonable applications for the expenses related thereto.

8. Any Class Member who wishes to object to the fairness, reasonableness, or adequacy of the proposed Modified Consent

Order, including without limitation the Co-Class Counsel's application for attorneys' fees and expenses, may do so by filing an Objection as set forth in the Notice.

9. Any attorney hired by a Class Member for the purpose of objecting to the proposed Modified Consent Order must enter a notice of appearance on the docket. Any such notice of appearance must be filed on or before _____, 2024.

10. Any Class Member who does not submit an Objection in the time and manner provided for in the Notice and this Order shall be deemed to have waived and forfeited any and all rights they may have to object and shall be foreclosed from making any objection to the fairness, reasonableness, or adequacy of the proposed Modified Consent Order.

11. One week before the Fairness Hearing Class Counsel shall provide to the Court all written objections and a list of all objecting Class Members, if any, who wish to address the Court at the Fairness Hearing via videoconference from Green Haven.

12. Class Members need not appear at the hearing or take any other action to indicate their approval of the proposed Modified Consent Order.

SO ORDERED.

Loretta A. Preska,
Senior U.S. District Judge